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No. 93-___

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

THE LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, et al.,

Appellants,

v.

JOHNNY DUPREE, et al.,

Appellees.

On Appeal From The United States District Court For The Southern District Of Mississippi

JURISDICTIONAL STATEMENT

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November 23, 1993

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QUESTIONS PRESENTED FOR REVIEW

1. Did the ruling below err as a matter of law by interpreting *Clark v. Roemer*, 500 U.S. ___, 111 S.Ct. 2096, 114 L.Ed.2d 691 (1991), to require, after the fact, that the submitting state perform the duty to "identify" "unambiguously" the pre-existing law being repealed, when the Code of Federal Regulations at the time of the submission allowed entire acts to be submitted without specific identification of the repealed statutes being changed?

2. Did the ruling below err as a matter of law by interpreting *Clark v. Roemer, supra*, to require the State in its Section 5 preclearance submission to anticipate and project the impact of a new state statute on future voting, including voting at county and municipal locations?

3. Whether, if the United States Attorney General can partially grant preclearance to portions of a statute submitted in its entirety, the burden then shifts to the United States Attorney General to identify unambiguously those portions of a voting change to which he objects, following *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), as to requirements regarding burden shift in a remedial statute?

4. Whether a municipal school district possesses standing under Section 5 of the Voting Rights Act to enjoin a state statute in the situation where the vote dilution requisite, the only "change affecting voting" for Section 5 jurisdiction, is created by the municipal school district's attempt to utilize the Voting Rights Act in this

QUESTIONS PRESENTED FOR REVIEW – Continued

action to expand its boundaries into a predominantly white area, thereby diluting existing black voting strength within the school district?

5. Did the three-judge district court err in construing its duties under Section 5 of the Voting Rights Act when it refused to accept evidence and address a remedy that would affect voting?

6. Whether, or to what extent, must a federal three-judge court (1) give deference to a prior state supreme court ruling in an identical case construing Section 5 of the Voting Rights Act, particularly in light of the ruling in *Growe v. Emison*, ___ U.S. ___, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993), on Section 2 of the Voting Rights Act, and (2) be bound by the state supreme court's construction of a previously precleared statute as a matter of state law?

7. Given (1) that the appointment (as opposed to the election) of school board members has been held outside the realm of Fourteenth Amendment scrutiny for purposes of a one person, one vote inquiry, (2) that a city has been held warranted under the Fourteenth Amendment in extending boundaries for certain purposes without assuming responsibility for all public functions, and (3) that *Milliken v. Bradley*, 418 U.S. 717 (1974), has generally prevented equal protection challenges from being raised across district lines, can the United States Justice Department claim Section 5 statutory coverage under the Voting Rights Act for a change affecting solely district boundaries for appointed school board members, particularly

QUESTIONS PRESENTED FOR REVIEW – Continued

after *Shaw v. Reno*, ___ U.S. ___, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993)?

8. Is a certain portion of Mississippi's Uniform School Law of 1986, the Section 47 repealer of Section 37-7-611, subject to preclearance procedures of Section 5 of the Voting Rights Act when it affects district boundaries of appointed school board members only, and does not affect any "qualification or prerequisite" or any "standard, practice or procedure with respect to voting", contrary to *Presley v. Etowah County Com'n*, ___ U.S. ___, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992)?

PARTIES TO PROCEEDINGS BELOW

The parties in the Court below were:

Plaintiffs: Johnny Dupree, Jeff R. Bowman, Catherine Jones and Charlotte Tullos, individually and in their official capacities as then members of the Board of Trustees of the Hattiesburg Public School District. Current Board of Trustee members are Dr. Ralph Noonkester, Marci McMahan, Daisy Thorne, Sam Buchanan and Warren G. Hood.

Defendants: Ray Mabus, in his capacity as Governor of the State of Mississippi, Mike Moore, in his capacity as Attorney General of the State of Mississippi, and the State of Mississippi.

Defendants/Intervenors: (1) The Lamar County Board of Education and Trustees, in their official capacities. At the time the action was filed, the members of the Lamar County Board were Charles L. Cameron, Rita Downs, Tommy Graham, Freddie D. Howell and Dr. Johnny R. Purvis. James Sider has replaced Stephen High who replaced Rita Downs on the Board. Fred Boudreaux has replaced Dr. Johnny R. Purvis on the Board. (2) Forrest County School District and Members of its Board of Trustees, in their official capacities. At the time the action was filed, the members of the Forrest County School Board were Bobby Patrick, Frank Myers, Mike Gilpin, John E. Clark and W. Larry Thompson. Current members of the Forrest County School Board are Mike Gilpin, Frank Myers, John E. Clark, W. Larry Thompson and Terry Ryals.

PARTIES TO PROCEEDINGS BELOW – Continued

Amicus Curiae: The United States of America has participated as amicus curiae to this proceeding since March 25, 1991.

The Plaintiffs in the Court below are the Appellees in this Court. The Appellants in this Court are the Defendants and the Defendants/Intervenors with the exception of Ray Mabus, former Governor of Mississippi, who was dismissed by the District Court and is not a party to this appeal.

This Jurisdictional Statement is filed on behalf of The Lamar County Board of Education and Trustees in their official capacities. The Forrest County School District and Members of its Board of Trustees, in their official capacities, and Mike Moore, in his capacity as Attorney General of Mississippi, and the State of Mississippi are filing a separate jurisdictional statement, in which the Lamar County Board of Education also joins.

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On Appeal From The United States District Court For The Southern District Of Mississippi

JURISDICTIONAL STATEMENT

INTRODUCTION

The Appellants have filed this interlocutory appeal from an injunction prohibiting enforcement of a Mississippi school law defining the geographic boundaries of urban and county school districts. The United States District Court for the Southern District of Mississippi, in its decision dated August 27, 1993, held that the State of Mississippi had failed to meet the standards of *Clark v. Roemer*, 500 U.S. ___, 111 S.Ct. 2096, 114 L.Ed.2d 691 (1991), when the State identified the Uniform School Law of 1986 in its entirety as the complete act to be submitted for review under Section 5 of the

Voting Rights Act, as opposed to providing copies of statutes repealed by individual sections of the Act.

OPINION BELOW

Dupree v. Mabus, 776 F. Supp. 290 (S.D.Miss. 1991), (*Dupree I*) *vacated and remanded, Dupree v. Moore*, ___ U.S. ___, 117 L.Ed.2d 609, 112 S.Ct. 1462, 60 U.S.L.W. 3651 (1992).

The Memorandum Opinion and Order of the District Court on remand (*Dupree II*) will be reported; it is currently available as 1993 WL 332265 and 1993 U.S. Dist. Lexis 14181 (S.D.Miss. Aug. 27, 1993). The decision is reprinted in the Appendix filed by Mike Moore, Attorney General of Mississippi, in His Official Capacity and the State of Mississippi and Forrest County School District and the Members of the Board of Trustees in Their Official Capacities, at App. A, p. 1a.[1]

On September 27, 1993, the three-judge district court entered its Order pursuant to Rule 60(a) of the Federal

[1] The Lamar County Board of Education and Trustees in their official capacities adopts the Appendix, A through Q, which appears in the Jurisdictional Statement of Mike Moore, Attorney General of Mississippi, in His Official Capacity and the State of Mississippi and Forrest County School District and the Members of the Board of Trustees in their Official Capacities, referenced as page numbers 1a through 208a. Appendix A and B annexed to this Jurisdictional Statement from Lamar County Board of Education and Trustees bear page numbers App. 1 through App. 11.

Rules of Civil Procedure to correct clerical mistakes. App. B, p. 33a.

On October 29, 1993, the three-judge district court entered its Order concerning Defendants' joint motions for new trial or to alter or amend, joint motion for remedy, and joint motion to stay pending appeal. App. A, p. App. 1.

JURISDICTION

The District Court entered its injunction on August 27, 1993. A Notice of Interlocutory Appeal was filed on September 24, 1993. The Court has jurisdiction of this appeal pursuant to 42 U.S.C. Section 1973c and 28 U.S.C. Section 2101.

The Lamar County Board of Education and Trustees joins the Jurisdictional Statement being filed concurrently by Mike Moore, Attorney General of Mississippi, in His Official Capacity and the State of Mississippi and Forrest County School District and the Members of the Board of Trustees in Their Official Capacities, except to clarify that rulings from *Dupree I* are not to any extent foreclosed from review.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. Section 1973c

This statute is reprinted in App. O, p. 204a.

28 C.F.R. Section 51.25 (1986)

This regulation is reprinted in App. P, p. 206a.

28 C.F.R. Section 51.27(b) (1986)

Each submission should contain the following information on documents to enable the Attorney General to make the required determination pursuant to Section 5 with respect to the submitted change affecting voting:

> A copy of any ordinance, enactment, order, or regulation embodying the voting practice that is proposed to be repealed, amended, or otherwise changed.

28 C.F.R Section 51.35 (1986)

This regulation is reprinted in App. Q, p. 208a.

Miss. Code Ann. Section 37-7-611 (1972)

This statute is reprinted in App. H, p. 144a.

Miss. Code Ann. Section 37-7-103 (1972 and Supp. 1990)

The two versions of this statute are set forth in App. G, pp. 113a and 114a.

STATEMENT OF THE CASE

This case is on appeal after remand for consideration in light of *Clark v. Roemer*, 500 U.S. ___, 111 S.Ct. 2096, 114 L.Ed.2d 691 (1991). App. E, p. 68a. The question considered by the three-judge court on remand was whether the repeal of Section 37-7-611, Miss. Code Ann. (1972) was precleared following the submission by the State of Mississippi of the entire Uniform School Law of 1986. The Uniform School Law contained the repealer of Section 37-7-611, at its Section 47.

This case arises from the enactment by the State of Mississippi of a comprehensive revision to its education laws, embodied in the education reform act called the Uniform School Law of 1986. (App. G, p. 84a). One section, Section 47 of the Uniform School Law, repealed a former provision, Section 37-7-611, which governed the modification of school district boundaries when territory is annexed by a city. Section 37-7-611 had held that an urban school district's geographic boundaries were coterminous with city limits. Annexations by cities therefore automatically expanded school boundaries. Another section, Section 52 of the Uniform School Law, amended Miss. Code Ann. Section 37-7-103 (1972) to give the board of each school district the authority to control the geographic boundaries of the school district. Section 52 provides that a school district may move its geographic boundaries into a neighboring district only with the consent of the neighboring district. It is uncontested that Section 52 of the Uniform School Law was precleared under Section 5 of the Voting Rights Act.

Prior law under Section 37-7-611 had provided that when a city annexed territory, the municipal school district automatically expanded to become coextensive with the newly created city limits. The repeal of Section 37-7-611 under the Uniform School Law would end the automatic expansion of school district territories to municipal boundaries upon annexation. The method of expanding a school district into neighboring territory would then reasonably be governed by Section 52 of the Uniform School Law which required the consent of the neighboring school board before the expansion of a school district corresponding to a city's expansion would take place.

28 C.F.R. Section 51.27(b) (1987) now provides that a copy of any repealed statute should be included with a Section 5 submission of the repealing legislation. That specific regulation was not in effect at the time of this State's submission of the Uniform School Law of 1986.

On July 22, 1986, the State of Mississippi identified the Uniform School Law to the Attorney General for preclearance under Section 5 by submitting that "Mississippi Uniform School Law of 1986 . . . is submitted . . . in its entirety," and, again, that "the complete act is submitted for review." (App. F, p. 72a).

On August 29, 1986, the Attorney General of the United States represented that he did "not interpose any objection to the voting changes occasioned by [the Uniform School Law] as identified in your July 22, 1986, letter." (App. I, p. 147a).

On March 31, 1989, the Attorney General interposed an objection to Section 47, the repealer of Section 37-7-611. (App. L, p. 165a) (specifically noting that, "we recognize that demographic patterns are not uniform throughout the state . . . ", p. 166a). After the State objected, (App. M, p. 169a) the Attorney General again determined it would not withdraw the objection by its letter of May 25, 1990 (App. N, p. 199a) arguing that the Attorney General should not have the responsibility of uncovering prospective voting changes "of which the state itself seemingly was unaware at the time the prior submissions were made." (App. N, p. 201a).

This civil action commenced on February 23, 1990. Meanwhile, and before any ruling was issued in the instant case, the Mississippi Supreme Court determined

that it had concurrent jurisdiction with the local three-judge federal district court and held that the repealer of Section 37-7-611 had been precleared pursuant to Section 5 of the Voting Rights Act and further held that Section 52 of the Uniform School Law was "a subsequent enactment covering a field of operation co-existent with [Section 37-7-611]" that "cannot by any reasonable construction be given effect while the prior law remains in existence because of irreconcilable conflict between the two acts." These judgments by the State Supreme Court were dismissed without discussion by the three-judge federal court in *Dupree II* by the single sentence footnote 10, "Hence, this court does not find persuasive the holding in *Greenville Public School District v. Western Line Consolidated School District*, 575 So.2d 956 (Miss. 1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1512, 117 L.Ed.2d 649 (1992), which held that the Attorney General had in effect precleared the repeal of Section 37-7-611 when he precleared Section 52." (App. A, p. 19a, n. 10).

The Attorney General had concluded that repealing the automatic school district annexation provisions of Section 37-7-611 would be "likely to create a class of city voters (for the most part predominately white) who will not reside in the city school system yet may vote for the city governing body which, under Mississippi law, appoints the city school board." (App. L, p. 167a). The Attorney General also noted that the State of Mississippi had provided "no explanation for the establishment of such a political system which appears not only to have the potential to impact negatively on the influence of minority city school district residents but also to treat black voters differently from white voters." (Letter of

March 31, 1989 from the United States Attorney General, App. L, p. 167a).

There have been no evidentiary hearings below. The case was disposed of on summary judgment when the District Court held that enforcement of the repealer of Section 37-7-611 was enjoined.

ARGUMENT

MISSISSIPPI'S SUBMISSION WAS PROPER

When the State submitted the Section 47 repealer of Section 37-7-611 in the Uniform School Law to the United States Attorney General in 1986, there was no requirement in effect that the State provide and/or identify pre-existing statutes as a part of its submission. The regulations of the Justice Department then in effect did not make it incumbent upon the State to identify specifically the pre-existing law when it described the new provisions of state law which were to go into effect if precleared.[2] As the District Court found, "While the text of Section 47 appeared in the notebook [submitted by the State], the texts of the 23 provisions repealed by Section 47 were not included." (App. A, p. 19a) and, "[h]ence, the State's submission failed to mention that pre-existing Mississippi law provided for automatic expansion of municipal

[2] The pertinent regulations are now changed, the old – 28 C.F.R. 51.25(b) is supplanted by the new 28 C.F.R. 51.27(b) (1987) providing that a copy of any repealed statute should be included with the Section 5 submission of the repealing legislation.

school districts without requiring the consent of the school board governing the affected, annexed territory." (Page 19 of the Opinion, App. A, p. 18a).

It is pointed out in the dissent in the District Court below that this ruling exceeds the holding of *Clark v. Roemer,* 500 U.S. ___, 111 S.Ct. 2096, 114 L.Ed.2d 691 (1991). The set of circumstances here presented raises questions of due process requirements for notice to submitting authorities of regulations imposed by the Department of Justice. A question is presented as to whether the Justice Department should be estopped from applying regulations other than those in effect when the submission was first made. Additionally, this ruling below raises questions of retroactive application of civil rights rules, currently before this Court in *Landgraf v. USI Film Products,* 968 F.2d 427 (5th Cir. 1992) *Rivers v. Roadway Express, Inc.,* 973 F.2d 490 (6th Cir. 1992), *cert. granted in part,* and cases consolidated, ___ U.S. ___, 113 S.Ct. 1250, 122 L.Ed.2d 649 (1993). It would be appropriate to remand this case in light of whatever results are obtained in that case during this term of Court.

THE DECISION BELOW RAISES QUESTIONS AS TO THE PROPER GEOGRAPHIC FOCUS OF A SECTION 5 SUBMISSION

The impact of the District Court's ruling would be to require the submitting authority not only to anticipate regulatory changes, but also to anticipate the impact of a new state statute on future voting, including voting at county and municipal locations. There is nothing in *Clark v. Roemer, supra,* which requires or addresses this result. There is a question as to what is the proper geographic

focus for a voting rights claim, that is, whether a statewide overview or a geographically compact denomination of minority interests is correct. This issue is before the Court this term in *Johnson v. De Grandy*, 794 F. Supp. 1076; 815 F. Supp. 1550 (N.D.Fla. 1992), *cert. granted*, ___ U.S. ___, 113 S.Ct. 2410, 124 L.Ed.2d 634 (1993). It would be appropriate to remand this case in light of the *Johnson v. De Grandy, supra*, decision whenever it is issued during this term of Court.

THE BURDEN OF PROOF MUST SHIFT TO THE UNITED STATES ATTORNEY GENERAL

Last term, this Court decided *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), to establish the point at which the burden of proof would shift in civil rights employment suits brought under Title VII. The Court and the parties needed to know who would bear the burden of going forward or the burden of persuasion.

In 1986 and thereafter, uncertainty developed in Section 5 of the Voting Rights Act as to whether the State continued to bear the burden of proof after it had submitted its proposed new legislation for preclearance. The law required the United States Attorney General to request additional information, or object, if not satisfied with the submission. Much of the confusion in this case has developed because the Attorney General did not request further information, and did not clearly object. Instead, the United States Attorney General sent what appeared to be its boiler-plate preclearance letter. Nowhere did that letter unambiguously identify the voting changes to which the Attorney General had objection, neither did it request

further information. To use *St. Mary's* as a parallel, the Justice Department not only did not identify a reason for its objection, it did not identify its objection itself. The State, having identified its new Uniform School Law, had received what appeared to be a preclearance letter rather than an objection or request for more information from Justice. It was this lack of clear statement from the United States Attorney General which led to the District Court's decision in *Dupree I*, 776 F. Supp. 290 (S.D.Miss. 1991), that, because the Attorney General had not objected, Section 47 was precleared.

Although the District Court did not abide by that result in its more recent decision below, the confusion which has been produced throughout this case is more the product of the ambiguity of the Attorney General's transmittal than the fault of any concealment of information on the part of the State. The Justice Department should be clear and understandable in its response to Section 5 submissions. It would be helpful to all parties, in this and other cases, to have clearly delineated the burdens of proof, so that such confusion can be avoided in the future. This case may be remanded in light of *St. Mary's*.

THE DISTRICT COURT ERRED IN CONSTRUING ITS DUTIES UNDER SECTION 5 OF THE VOTING RIGHTS ACT WHEN IT REFUSED TO ACCEPT EVIDENCE AND ADDRESS A REMEDY THAT WOULD AFFECT VOTING.

The District Court rejected the opportunity to accept evidence and ruled on this case by summary judgment, as a matter of law. (Order, App. A, p. 1a). It did make critical

fact findings however, such as its finding that a prediction of white controlled city and school district elections was correct. The Court refused to accept proof as to how to fashion an appropriate remedy. This ruling below leaves the parties in doubt as to how to hold elections.

Brooks v. Georgia Board of Elections, held that a three-judge court has limited discretion to fashion an appropriate remedy in a Section 5 action, 790 F. Supp. 1156 (S.D.Ga. 1992). This recent *Brooks* decision highlights a split of authority in the courts below regarding the scope of the remedial powers of a three-judge district court. It would be appropriate to remand this case for further consideration, both as to the burden of proof shift under *St. Mary's*, discussed above, and for the fashioning of an appropriate remedy.

THE PLAINTIFF MEMBERS OF THE HATTIESBURG MUNICIPAL SCHOOL DISTRICT LACK STANDING

To find Section 5 jurisdiction, the Court below had to find changes in voting practices and procedures. In *Dupree I*, the District Court held that Section 47 of the Uniform School Law resulted in a class of city voters who did not reside in the city school system, but who did participate in city elections, which led to the appointment of the school district members, thereby indirectly affecting the vote.[3] However, enjoining Section 47, on the city

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[3] See discussion of changes affecting voting at pages 5 and 6 of the District Court's Opinion in *Dupree II*. (App. A, pp. 5a and 6a). Notice that the sections quoted in *Dupree II* make reference to "voting" in every clause (App. A, p. 5a); there is no mention of indirect effect or impact upon appointive officers.

school board's own argument, brings about an automatic extension of the school district boundaries to be conterminous with the city limits. The result is that the same class of voters, presumably white, who will now reside in both the city and the school district, still vote in the city elections, still elect those who appoint the school board, and so still dilute minority voting strength.

The Plaintiff school board should not have standing to seek the very dilution of minority voting strength which gives rise to Section 5 jurisdiction in this matter.

THE DISTRICT COURT HAS CREATED AN IMPENDING COLLISION BETWEEN THE VOTING RIGHTS ACT AND THE FOURTEENTH AMENDMENT

Last term in *Shaw v. Reno*, ___ U.S. ___, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993), the United States Supreme Court determined that white citizens have standing under the Fourteenth Amendment to challenge a voting rights remedy which gerrymandered a long, thin, snake-like corridor of minority voters together in order to maximize minority voting strength.

In the past, issues raised by the case here at bar have not found themselves subject to relief under the Fourteenth Amendment, but rather have been at the dividing line at which the courts would not recognize Fourteenth Amendment relief. There are three areas which serve as examples. First, the appointment, as opposed to the election, of school board members has been held outside the realm of Fourteenth Amendment scrutiny for purposes of

a *Reynolds v. Sims*[4] "one person, one vote" inquiry. *Sailors v. Board of Education*, 387 U.S. 105 (1967). In *Sailors*, one person, one vote relief was denied where a county board of education was basically appointive rather than elected, and there was some discussion that the board was more fundamentally administrative than legislative. Second, a city has been held warranted under the Fourteenth Amendment in extending its boundaries for certain purposes[5] without assuming responsibility for all public functions. *Holt Civic Center v. Tuscaloosa*, 429 U.S. 60 (1978). Similarly, it may be noted that in *Town of Lockport v. Citizens for Community Action*, the United States Supreme Court stated that "A proposal that several school districts join to form a consolidated unit could surely be subject to voter approval in each constituent school district," 430 U.S. 259, 271 (1977). Under these Fourteenth Amendment cases it appears that the boundary disputes here at issue would be beyond the reach of the Equal Protection Clause. Third, *Milliken v. Bradley*, 418 U.S. 717 (1974), has generally prevented equal protection challenges being raised across school district lines.

Given these developments in the case law, an issue exists as to whether the United States Justice Department can claim Section 5 statutory coverage under the Voting Rights Act for a change affecting district boundaries for

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[4] 377 U.S. 533 (1964).

[5] The certain purposes recognized were that the city could extend its (1) police, (2) sanitary, and (3) business licensing powers to individuals living within 3 miles of the city's corporate boundaries, meeting a rational basis test under the Fourteenth Amendment.

appointed school board members, particularly after *Shaw v. Reno*. Allowing the Justice Department a broader sweep through its Section 5 powers will put it on a collision course with private claims brought under the Fourteenth Amendment.

SHOULD THE THREE-JUDGE COURT BELOW HAVE GIVEN DEFERENCE TO THE MISSISSIPPI SUPREME COURT?

Whether or to what extent must a three-judge court give deference to a prior state Supreme Court ruling on the identical issue construing Section 5 of the Voting Rights Act, particularly in light of the ruling in *Growe v. Emison*, ___ U.S. ___, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993), which held that a state has primacy in the redistricting domain under Section 2 of the Voting Rights Act. There, relying on *Scott v. Germano*, 381 U.S. 407 (1965), the United States Supreme Court required federal courts to recognize that the state's instrumental role in redistricting inheres in the judicial branch as well as the legislature. "Minnesota can have only one set of legislative districts, and the primacy of the state in designing those districts compels the federal courts to defer." *Ibid.*, at 122 L.Ed.2d 400.

Here, during the pendency of this case, the Mississippi Supreme Court decided in *Greenville Public School Dist., et al. v. Western Line Consol. School Dist., et al.*, 575 So.2d 956 (Miss. 1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1512, 117 L.Ed.2d 649 (1992), that Section 47 had been precleared and that if Section 47 had not been specifically precleared, it had been precleared by implication. The Mississippi Supreme Court also construed state law by

holding that Section 52 which was precleared,[6] was in conflict with Section 47 and due to rules of statutory construction Section 52 would prevail. In light of that decision, and its subsequent denial of certiorari, the result in *Greenville, Mississippi,* and in any other city able to litigate only in state court, will be to design city limits and school districts in accordance with Sections 47 and 52, while expanding cities which are found under jurisdiction of the federal courts will be enjoined from use of Section 47.[7] Thus as in *Growe v. Emison, supra,* the State can have only one set of school districts, but the divergent results of the state and federal courts allow two different rules of law to compete.[8] The District Court

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[6] Section 52 was among the 13 express submissions of the State of Mississippi explicitly identified in the submission of the Uniform School Law of 1986 to which the United States Attorney General specifically entered no objection. (App. G, p. 84a). Since Section 52, mandating consent by all school districts before school boundaries can change, was precleared, the more specific Section 47, applying only in municipal annexations, must have been precleared.

[7] The remedial effect and impact of Section 52 if 47 is enjoined remains undecided by the Court below. The Court has not ruled on the Joint Motion for Remedy filed by the Lamar County Board of Education and Trustees in their Official Capacities, Mike Moore, Attorney General of Mississippi, in His Official Capacity and the State of Mississippi, and Forrest County School District and Trustees. (App. A, p. App. 1).

[8] In *Hathorn v. Lovorn,* 457 U.S. 255, 269 n.23 (1982), the Court stated: "[p]ersons dissatisfied with a state court's . . . resolution of a Section 5 issue in proceedings involving other parties . . . are likely to be able to litigate the issue anew in federal court." *Hathorn* did not discuss the possibility of, for example, collusive suits being brought in a chosen forum to obtain a chosen result.

below has ignored the primacy of the State in designing those districts. It is this primacy to which a federal district court should be compelled to defer. *Growe v. Emison, supra.* That ruling concerning Section 2 of the Voting Rights Act should be extended by analogy to Section 5 of the same Act.[9]

There is also the question as to whether the District Court should be bound by the State Supreme Court's construction of a previously precleared statute. If the rulings of *Greenville, Mississippi* are construed as a matter of state law, recent pronouncements from the United States Supreme Court would seem to make it clear that the state construction would control. "In construing the . . . ordinance, we are bound by the construction given it by the Minnesota court." *R.A.V. v. City of St. Paul, Minnesota,* ___ U.S. ___, 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305 (1992).

THE RULING BELOW WAS CONTRARY TO *PRESLEY V. ETOWAH COUNTY COMMISSIONERS*

Is a certain portion of Mississippi's Uniform School Law, the repealer of Section 37-7-611, Section 47 of the Uniform School Law, subject to preclearance procedures of Section 5 of the Voting Rights Act when it affects district boundaries of an appointed school board and does not affect any "qualification or prerequisite" or any "standard, practice or procedure with respect to voting", contrary to *Presley v. Etowah County Commissioners,*

---

[9] It appears unresolved whether influence dilution claims are actionable under Section 2 of the Voting Rights Act. *See, e.g., Voinovich v. Quilter,* ___ U.S. ___, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993). It also appears to be an open question whether the Fifteenth Amendment applies to vote dilution claims. *Id.*

___ U.S. ___, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992)? The Court in *Dupree I* found Section 5 applicable on the basis of an "indirect" effect on voting. The District Court below recognizes that the school district is not itself an elective body in Hattiesburg, Mississippi. The Board is appointed by the elected Hattiesburg Board of Aldermen. Last term in *Presley v. Etowah County Commissioners, supra,* the United States Supreme Court held that changes in the appointive powers of elected officials are not subject to the Voting Rights Act.

There is, additionally, a conflict among the circuits in determining when particular political expression or organization constitutes "voting." Previously, for example, the Tenth Circuit had held that espousing or appointing a particular political viewpoint through the signing of an initiative was not "voting" within the meaning of the Voting Rights Act of 1965. *Montero v. Mayer,* 861 F.2d 603 (10th Cir. 1988), *cert. denied,* 492 U.S. 921 (1989). The ruling from the District Court cannot be reconciled with these prior decisions.

CONCLUSION

This case raises so many problems because it is attempting to apply the Voting Rights Act at cross purposes with the Congressional intent behind that civil rights legislation. The Plaintiffs/Appellees, Hattiesburg School District, are not the disenfranchised, under-represented and poor, as the civil rights acts presume. These Plaintiffs/Appellees are the appointed members currently serving under an elected and serving city

government. The Plaintiff city school district is not seeking to maximize minority voting strength, but to dilute it.

Just as the attorneys' fees provisions of the civil rights statutes are not designed to provide fees to defendants acting under color of state law, neither are the substantive provisions of the civil rights statutes intended to secure political advantage for municipal governments in ongoing turf battles. There is a risk that the District Court's Opinion below, left uncorrected, would lead to the future use of the Voting Rights Act as a common weapon in the arsenal of local politicians, rather than bringing about the equalization of political representation, as was the intent of the Voting Rights Act.

Respectfully submitted,

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Counsel for Appellants The Lamar County Board of Education and Trustees, in Their Official Capacities, Charles L. Cameron, James Sider, Tommy Graham, Freddie G. Howell and Fred Boudreaux

November 23, 1993

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI HATTIESBURG DIVISION

JOHNNY DUPREE, ET AL. PLAINTIFFS

V. CIVIL ACTION NO. H90-0043(W)

MIKE MOORE, ET AL. DEFENDANTS

and

THE LAMAR COUNTY BOARD OF EDUCATION, DEFENDANTS/INTERVENORS

and

FORREST COUNTY SCHOOL DISTRICT, ET AL. DEFENDANTS/INTERVENORS

ORDER

(Filed Oct. 29, 1993)

The matter is before the Three-Judge Court on the motion of the defendants Mike Moore, Attorney General of Mississippi, in his official capacity, and the State of Mississippi, and the defendants/intervenors Lamar County Board of Education and Trustees and Forrest County School District for new trial or to alter or amend the opinion and order of the Three-Judge Court issued August 27, 1993. Also before the Three-Judge Court are the defendants' joint motion for remedy and a joint motion to stay pending appeal.

The defendants filed a notice of interlocutory appeal to the Supreme Court of the United States on September

24, 1993. The Three-Judge Court has reviewed the defendants' motions for new trial or to alter or amend order and the joint motion for remedy and finds that the relief requested pursuant to these motions would intrude needlessly upon the proceedings now pending before the Supreme Court of the United States. Therefore, the Three-Judge Court shall withhold ruling on these motions until such time as the Supreme Court of the United States has reached its conclusion with regard to the matter now on appeal.

The joint motion of the defendants for stay pending appeal is denied.

SO ORDERED AND ADJUDGED this the 29th day of October, 1993.

/s/ Rhesa Barksdale
RHESA BARKSDALE
UNITED STATES CIRCUIT JUDGE

/s/ Tom S. Lee
TOM S. LEE
UNITED STATES DISTRICT JUDGE

/s/ Henry T. Wingate
HENRY T. WINGATE
UNITED STATES DISTRICT JUDGE

Dupree v. Moore, H90-0043

APPENDIX B

STATE OF MISSISSIPPI
[SEAL]
OFFICE OF THE ATTORNEY GENERAL

JIM WARREN
Special Assistant to
the Attorney General
FRANK SPENCER
Assistant Attorney General
Director, Public Advocacy
BEVERLEY D. COLEMAN, CPA
Director, Administration

MIKE MOORE
ATTORNEY
GENERAL

STEPHEN J. KIRCHMAYR
Deputy Attorney General
Litigation
ROBERT L. GIBBS
Deputy Attorney General
State/Local Government,
Opinions

January 27, 1989

Honorable Gerald W. Jones
Chief, Voting Section
Civil Rights Division
P. O. Box 66128
Washington, D.C. 20035-6128

Re: Supplemental Information Requested
Chapter 492, § 47 (1986)
Your File Nos. T0966 and T3369

Dear Mr. Jones:

On July 22, 1986, the State of Mississippi submitted Chapter 492 Laws of 1986 for preclearance under Section 5 of the Voting Rights Act of 1965, as amended and extended (42 U.S.C. § 1973(c)). On August 29, 1986, Chapter 492 was precleared under Section 5 as to the particular sections identified in our July 22, 1986 submission.

On December 30, 1987, the State of Mississippi submitted Section 47 of Chapter 492 since Section 47 was not specifically identified in our original submission. On March 2, 1988, we received your letter dated February 29, 1988 requesting additional information to be considered in connection with your review of Section 47. In response to

these requests, the following information is submitted, to-wit:

Request No. 1.

1. A detailed description of the process that resulted in the repeal of §37-7-611. In that regard, we understand that a committee appointed by the State Auditor prepared draft legislation which was the basis for Chapter 492, and that the committee's proposal did not provide for the repeal of § 37-7-611. Identify the specific manner in which the repealer was incorporated into Chapter 492 and, if it was added by an amendment, provide a breakdown of votes, by member, for that amendment. Identify the legislators who were the principal proponents of the repeal and provide daytime telephone numbers at which they may be contacted. Provide copies of any legislative analyses of the meaning and effect of the repealer and all newspaper articles, editorials, and letters to the editor concerning the repeal of §37-7-611.

Response to Request No. 1.

As stated in our submission of Section 47, the obvious reason for this repealer provision is to void any piecemeal legislation dealing with the subject addressed in the uniform school law. Section 47 is simply a house cleaning measure for Chapter 492, most of which has already been precleared by the United States Justice Department. It is error to view the inclusion of the repeal of Section 37-7-611 as an isolated legislative act.

The repeal of Section 37-7-611 and the numerous other code provisions repealed by Section 47 of Chapter 492 were incorporated into the original senate draft of the uniform school law. It was not added by way of amendment. On information from Mr. Robert Davidson, Staff Attorney for the Senate Interim Committee to Study Public School Finance and Administration, who was also a member of the State Auditor's Advisory Committee, the

repeal of Section 37-6-611 was incorporated into the draft of the legislation submitted to the Senate Committee by the Advisory Committee appointed by the state auditor. Attached hereto as Appendix A are various memoranda establishing the Auditor's Committee, listing its members, and outlining its efforts.

Chapter 492, as declared by Section 1 thereof, is known as the "Mississippi Uniform School Law of 1986. The purpose of this legislation is aptly stated in Section 2 of the act, to-wit: "From and after July 1, 1987, all school districts in the State of Mississippi shall have the same prerogatives, powers, duties, and privileges as provided in this act."

In order to accomplish uniformity in the powers, duties and privileges in all school districts, it was necessary to repeal numerous sections of the old education law that were inconsistent with the purpose and provisons of Chapter 492. Accordingly, Sections 44 through 51 of Chapter 492 repealed a total of seventy-two (72) provisions of the old education law. Section 44 repealed eleven (11) sections which prescribed the powers and duties of county boards of education. Section 45 repealed three (3) sections which provided for the organization of boards of trustees of municipal separate and consolidated school districts. Section 46 repealed two (2) sections which provided for the expenditure of school district funds for incidentals and further provided for contracts for attendance and transportation of pupils by municipal separate school districts. Section 47 repealed twenty-three (23) sections which provided for the creation and operation of municipal separate school districts, one of which was Section 37-7-611. Section 48 repealed twelve (12) sections which provided for the operation of special municipal separate school districts. Section 49 repealed six (6) sections which provided for the creation and operation of line consolidated school districts. Finally, Section 51 repealed nine sections which mandated and provided for a reorganization of school dis-

tricts in 1957. The specific code sections repealed by Sections 44 through 51 of Chapter 492 are as follows:

37-5-21	37-7-313	37-7-629	37-7-733	37-7-903
37-5-23	37-7-601	37-7-631	37-7-735	37-7-905
37-5-25	37-7-603	37-7-633	37-7-737	37-7-907
37-5-27	37-7-605	37-7-635	37-7-739	37-7-909
37-5-29	37-7-607	37-7-637	37-7-741	37-7-911
37-5-31	37-7-609	37-7-639	37-7-743	37-7-1
37-5-33	37-7-611	37-7-641	37-7-745	37-7-3
37-5-35	37-7-613	37-7-643	37-7-801	37-7-5
37-5-37	37-7-615	37-7-645	37-7-803	37-7-7
37-5-39	37-7-617	37-7-719	37-7-805	37-7-9
37-5-41	37-7-619	37-7-721	37-7-807	37-7-11
37-7-231	37-7-621	37-7-727	37-7-809	37-7-13
37-7-233	37-7-623	37-7-729	37-7-811	37-7-15
37-7-235	37-7-625	37-7-731	37-7-901	37-7-17
37-7-309	37-7-627			

As previously stated, the repeal of Section 37-7-611 cannot properly be viewed as an isolated legislative act as your several requests suggest. It was repealed together with a host of other laws for the purpose of placing all school districts on an equal footing, so that after July 1, 1987 all school districts in the state would have the same prerogatives powers, duties and privileges as mandated by Section 2 of Chapter 492. In this context, it should be noted that the sponsors of Chapter 492 sponsored the bill in its entirety and cannot be singled out as "principal proponents of the repeal of Section 37-7-611." The sponsors of Chapter 492 were as follows: Senators Jack Gordon, Irb Benjamin, Rob Smith, Alan Heflin and Cy Rosenblatt. The Mississippi Legislature is currently in session and these senators can be reached during the day at (601) 359-3770. The members of the Mississippi House of Representatives Education Committee who were instrumental in the passage of the Uniform School Act were as follows: "Representatives Robert Clark, Rick Fortenberry, Horace Buckley, Billy McCoy, Thomas Walman, and Jerry

Wilkerson. These representatives can also be reached at the above phone number.

Request No. 2.

A detailed explanation of the reasons for the repeal of §37-7-611, and identify the sources of your information as to the reasons for the repeal. Indicate whether the repeal was related to any particular pending or planned annexations by municipalities which have municipal separate school districts. We note that you have indicated that the reason for repealing §37-7-611 was that it was "piecemeal legislation" concerning the method by which school district boundaries may be altered. However, it has been alleged that there are special circumstances which justify the provision in §37-7-611 that when a municipality with a municipal separate school district annexes territory located in an adjacent school district the boundaries of the municipal school district also are automatically extended into the adjacent district. Once such special circumstance may be that the persons annexed into the municipality thereby become eligible to vote for the municipal governing body which in turn appoints the members of the municipal school district's board of trustees. Indicate the extent to which this circumstance was considered in determining that §37-7-611 should be repealed. It also would be helpful if you would provide information as to the legislative history of § 37-7-611 and the reasons for its adoption.

Response to Request No. 2

The Attorney General's Office has contacted legislators, legislative staff, education officials and school board attorneys[1] as to the reason for the repeal of Section 37-

[1] School officials and attorneys for Hattiesburg Public School District, Western Line Consolidated, Greenville Municipal, Harrison County, Biloxi and Gulfport schools and municipalities have filed written statements with your office expressing their views regarding the repeal of Section 37-7-611.

7-611. Other than one suggestion that the repeal of Section 37-7-611 was mistakenly incorporated into Chapter 492, the general view held is that the repeal of this section and the seventy one (71) other code sections were consistent with the legislative purpose to create uniformity among the various types of school districts by granting all districts the same prerogative powers, duties and privileges. The repeal of Section 37-7-611 was not considered separately but rather was considered together with the repeal of all the provisions listed in response to Request No. 1 which concerned the creation and operation of the various types of school districts existing under the prior education law. The *Report of the Senate Interim Committee to Study Public School Finance and Administration in Mississippi* contains the following statement:

> "Mississippi schools currently operate under four different kinds of school districts—eight if you count the sub-categories—each with its own system of government and finance. In addition to municipal separate districts, the state now has special municipal separate, consolidated and countywide school districts. These types of districts were the result of the Special Session of the Legislature in 1953 which reduced more than 2,000 Mississippi school districts to 151 school districts, and were considered necessary at that time. Several types of districts in existence today are still serving well but there are flaws in each. *It appears that if there were only one type of district so that all of the laws pertaining to districts would apply to each district in the state, rather than special laws for special types of districts, the administration and operation of school districts would be more effective and beneficial to the state.*" (Emphasis added)

Excerpts of the *Report of the Senate Interim Committee to Study Public School Finance and Administration in Mississippi* are attached hereto as Appendix B.

The repeal of Section 37-7-611 and the seventy-one (71) other "special laws for special types of districts "were considered essential to effectuating the purpose of Chapter 492. It does not appear that consideration was given to any special circumstances that may have justified leaving the provisions of Section 37-7-611 in tact. It was apparently felt that the provisions of Section 52 of Chapter 492 authorizing school districts to abolish or reorganize such districts or change or alter the boundaries of any school district would still allow school districts the option to expand and at the same time extend to all school districts the same privileges.

Section 37-7-611 was first enacted at the 1953 Extraordinary Session of 1953 as Chapter 23 §6. It was revised by Chapter 29, §1, 1959 Extraordinary Session. The 1959 amendment did not change the relevant language of Section 37-7-611. Copies of these chapter laws are attached as Appendix C. Similar annexation provisions existed under earlier Mississippi Codes, e.g., see Chapter 315, § 1 of 1926 Laws, a copy of which is included in Appendix C.

Request No. 3.

Identify the minority legislators or minority citizens who specifically were consulted regarding the inclusion of this repealer in Chapter 492 and summarize the comments they provided. If no minority legislators or citizens were consulted, explain the reasons for this omission.

Response to No. 3.

Like Request Nos. 1 and 2 above, this request presupposes that the repeal of Section 37-7-611 was given separate and individual consideration and that it was viewed as something other than a house cleaning measure. Several minority legislators were instrumental in the passage of

Chapter 492. Two in particular were Representative Robert Clark and Representative Horace Buckley. They can be reached during the day at (601) 359-3770.

Request No. 4.

It has been alleged that annexations by municipalities which have municipal separate school districts generally are of predominantly white residential areas, and that the repeal of § 37-7-611's automatic boundary extension provision will permit municipal annexation of these areas and, at the same time, allow those whites to remain in predominantly white school districts that adjoin predominantly black municipal school districts. Please provide us with whatever information the state has which may be enlightening on this issue. In particular, include information on the population, by race, of any annexations proposed by "municipal school district" cities which currently are pending in a chancery court or other proceeding (if an annexation of proposed annexation includes an area that was part of the "added territory" of the municipal school district, provide the requested population data separately for the annexed "added territory" and the annexed area that was not in the municipal school district). Include the student population, by race, of each municipal separate school district in the state and each county, consolidated, and consolidated line school district that adjoins a municipal school district.

Response to Request No. 4.

The State of Mississippi does not maintain a centralized system for the reporting of municipal annexations. The U. S. Department of Justice is the only agency to our knowledge that maintains these records.

While the data sought by this request may be a permissible inquiry in the context of examining any alleged discriminatory purpose underlying the repeal of Section 37-7-611, which we submit cannot exist in this case, the

data sought, i.e. the racial composition of school population is totally irrellevant to a Section 5 inquiry.

Additionally, in view of the Section 5 preclearence requirements with respect to municipal annexations, and in light of the establishment of single member education 523 of the 1988 Laws of Mississippi, we cannot see how the repeal of Section 37-7-611 can operate so as to impermissibly dilute or restrict minority voting rights. It is noted that the *Joint Resolution Memorializing the Repeal of Section 37-7-611, Miss. Code of 1972, as amended, for Preclearance by the United States Department of Justice*, filed with your office by officials of Harrison County, Biloxi and Gulfport School Districts, as well as the officials of the cities of Gulfport and Biloxi, express the view in its accompanying cover letter that if Section 37-7-611 were to be enforced in their area, it would operate to dilute minority voting strength in the election of the members to the Harrison County School Board.

If you have any questions about this response, please contact the undersigned at (601) 359-3839, Also, Mr. Robert Davidson, who was Staff Attorney for the Senate Interim Committee to Study Public School Finance and Administration, is very familiar with the legislative history of the Uniform School Law and he can be reached at (601) 359-3217.

Sincerely,

/s/ Giles W. Bryant
Giles W. Bryant
Special Assistant Attorney General

/jw